Petition

81-1173

Office · ·rt, U.S.
F] ' D
DEC 10 1981
ALEXANDER L. STEVAS,
CLERK

NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

CERTAIN-TEED PIPING MATERIALS, INC.,

Petitioner,

v.

HYDROAIRE, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Geoffrey G. Gilbert
Three First National Plaza
38th Floor
Chicago, Illinois 60602
(312) 346-6191

December 10, 1981

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

CERTAIN-TEED PIPING MATERIALS, INC.,

Petitioner,

v.

HYDROAIRE, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

CERTAIN-TEED PIPING MATERIALS, INC. prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on June 22, 1981.

QUESTION PRESENTED

Whether the practice of a court of appeals to use unpublished, uncitable orders, rather than full opinions, to avoid accountability for decisions contrary to existing precedent, departs from the accepted course of judicial conduct.

TABLE OF CONTENTS

Question Presented 2

Table of Contents 2

Table of Authorities 4

Opinions Below 6

Jurisdiction 7

Statutory Provisions and Rules Involved 8

Statement of the Case 8

Reasons for Granting the Writ . . . 13

I. Summary of Reasons For Granting For The Writ 14

II. The Decision Below That No Causal Nexus Need Be Established Between Breach And Damage is Unprecedented And Wrong 17

III. The Seventh Circuit's Own Rules Required That The Decision In This Case Be Published 17

IV. The No-Publication, No-Citation Rule Allowed The Court To Limit This Novel Rule Of Law To This Case, Avoiding The Accountability Demanded by Stare Decisis And Publication; Such Conduct So Departs From The Accepted Course Of Judicial Conduct As To Call For An Exercise Of This Court's Power Of Supervision 19

Conclusion 29

Appendix . . . . . (A-1)

I. Order and Judgment Of Court Of Appeals . . . . . (A-1)

II. Denial of Petition for Rehearing . . . . . (A-9)

III. Paragraph 12 of the Conclusions of Law in the Memorandum Opinion of the District Court . . . . . (A-11)

IV. Text of Statutory Authorities and Rules Involved . (A-14)

TABLE OF AUTHORITIES

Statutes and Rules

28 U.S.C. §1254 7
28 U.S.C. §1291 20
28 U.S.C. §1332 . . . . . 9, 20
7th Cir.Ct.App.Ct.R. 35 . . .11, 12, 17

Ill.Rev.Stat.ch 26 §1-103 (1979) 12, 16
Ill.Rev.Stat.ch 26 §2-715 (1979)11,14,17

Cases

Browder v. Director, Department of Corrections, 434 U.S. 257 (1978) . . 26

Central Ill. Light Co. v. Stenzel, 44 Il.App. 2d 388, 195 N.E.2d 207 (3d Dist. 1963) 15

Doherty v. United States, 404 U.S. 28 (1971) 21

Hughes v. Rowe, 449 U.S. 5 (1980) . 25

Ill. Central R.R. Co. v. Crail, 281 U.S. 57 (1930) 14

Isbell Enterprises, Inc. v. Citizens Casualty Co., 431 F.2d 409 (5th Cir. 1970) 19

L. Albert & Son v. Armstrong Rubber Co., 178 F.2d 182 (2d Cir. 1949). . 15

Lego v. Twomey, 404 U.S. 477 (1972) 26

Miller v. Robertson, 266 U.S. 243 (1924) 14

N.L.R.B. v. Amalgamated Clothing Workers, 430 F.2d 966 (5th Cir. 1970) 19, 22

P.S. & E., Inc. v. Selastomer Detroit, Inc., 470 F.2d 125 (7th Cir. 1972) . . . 15

Robie v. Ofgant, 306 F.2d 656 (1st Cir. 1962) 16

Tarter v. MonArk Boat Company, 430 F.Supp. 1290 (E.D.Mo. 1977), aff'd, 574 F.2d 984 (8th Cir. 1978) 16

Taylor v. McKeithen, 407 U.S. 191 (1972) 21

United States v. Forness, 125 F.2d 928 (2d Cir.) cert. denied sub nom, Salamanca v. United States, 316 U.S. 694 (1942) 23

Will v. United States, 389 U.S. 90 (1967) 26

OTHER AUTHORITIES

Comment, A Snake in the Path of the Law: The Seventh Circuit's Non-Publication Rule, 39 U.Pitt.L.Rev. 309 (1977) 26

5 Corbin on Contracts §992 (West 1964) 15

Fuller and Perdue, The Reliance Interest in Contract Damages, 46 Yale L.J. 373. 15

Leflar, Some Observations Concerning Judicial Opinions, 61 Colum.L.Rev. 810 (1961) 23

Note, Unreported Decisions in the United States Courts of Appeals, 63 Cornell L.Rev. 128 (1977) . . . 25

Report of the Judicial Conference of the United States, March 16, 1964 . . . . . 18, 19

Restatement (Second) of Contracts §347 15

Restatement (Second) of Contracts §349 16

Reynolds and Richman, An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform, 48 U.Chi.L.Rev. 573 (198]) 21

Reynolds and Richman, Limited Publication in the Fourth and Sixth Circuits, 1979 Duke L.J. 807 (1979) 24

Reynolds and Richman, The Non-Precedential Precedent -- Limited Publication and No Citation Rules in the United States Courts of Appeals, 78 Colum.L.Rev. 1167 (1978) 24

11 Williston on Contracts §1338 (1968) 15

OPINIONS BELOW

The judgment of the Court of Appeals was issued as an unpublished order a copy of which appears in the Appendix hereto. The District Court for the Northern District of Illinois issued an unpublished Memorandum

Opinion the relevant portion of which is also reproduced in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on June 22, 1981 and timely petition for rehearing en banc filed on July 6, 1981. Although the Court ordered Respondent to file a response, the petition was denied on September 11, 1981. This petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

Seventh Circuit Rule 35

(Reproduced in Appendix at A(14)

Illinois Revised Statutes, Ch 26,

§1-103 (Reproduced in Appendix at A(22)

§2-715 (Reproduced in Appendix at A(22)

STATEMENT OF THE CASE

On December 2, 1974, Petitioner's predecessor in interest, Pollution Equipment Co. ("P.E.C.") and Respondent entered into a Sales Representation Agreement under which Respondent would distribute in the Midwest submersible sewage pumps imported by P.E.C. At that time, Respondent had an existing facility and staff; consequently, it incurred virtually no expenses in reliance on the contract with P.E.C. beyond those it would have incurred to promote its existing lines.[1] Respondent continued to

---

[1]Respondent testified that it incurred approximately $5,000 in advertising expenses solely for the promotion of the P.E.C. line. However, it has never denied that these were completely recouped by the $9,025 in profits it made under the contract with P.E.C.

sell P.E.C. pumps under the agreement for 21 months, until August 1976, when P.E.C. terminated the agreement.

Respondent filed this action alleging that P.E.C. had wrongfully terminated the Sales Representation Agreement in August 1976, invoking the diversity jurisdiction of the District Court. 28 U.S.C. §1332. Petitioner has conceded on appeal that termination was in breach of the contract.[2]

Respondent sought to recover damages measured by the expenses allegedly incurred in reliance on the contract which it claimed it had been unable to recoup because of the wrongful termination. Petitioner has never disputed Respondent's theory; but Respondent failed to offer evidence at trial of <u>any</u> unrecouped expense or

---

[2]At trial, Petitioner maintained that the termination was justified by Respondent's anemic sales of $28,000 over the entire 21 month term.

damage incurred as a result of its entry into the Agreement with P.E.C.[3] Instead, Respondent offered testimony of certain fixed operating expenses (which allegedly "assisted in the promotion" of P.E.C.'s products), and allocated a portion of those expenses to P.E.C. even though they were not incurred in reliance on the P.E.C. agreement.[4]

The case was tried to Judge Flaum, sitting without a jury in the Northern District of Illinois. The court entered judgment, under Respondent's damage theory for $45,422.18, but although

---

[3]Respondent also did not offer evidence of any expense or damage caused by the breach.

[4] Respondent apportioned approximately 18% of its operating expenses to P.E.C. because that was the percentage of salespersons' time which the testimony showed was spent on promotion of P.E.C. products. The salespeople were not paid directly for their time, however, but were compensated according to a fixed salary plus commission.

Judge Flaum stated that he was applying Respondent's reliance damage theory, he made no finding that any of the expenses included in the award were incurred as a result of the P.E.C. agreement. App. at A(4) 11-13).

Petitioner appealed from that judgment to the Court of Appeals for the Seventh Circuit, contending, inter alia, that the District Court had improperly awarded damages without any evidence of causation. The Court of Appeals affirmed the judgment below in an unpublished order, not to be cited, under Circuit Rule 35. App. at A(1-8). As to Petitioner's causation argument, the Court held that the Uniform Commercial Code was applicable to this action and that:

> Fixed expenses, if they satisfy the definition of §2-715(2)(a) [which allows consequential damages incurred as a result of a breach] are recoverable, notwithstanding general principles of contract law cited by defen-

> dant that prohibit recovery of fixed costs. Ill.Rev.Stat. ch. 26 §1-103.

App. at A(4).

Petitioner petitioned the Court of Appeals for a rehearing en banc, contending that the Court had established two new and unprecedented rules of law (1) by applying the U.C.C. to a distributorship agreement of this type, and (2) by awarding damages without any evidence of causation. To do so, in an unpublished order, was in violation of Circuit Rule 35.[5]

On September 11, 1981, the Court of Appeals denied the Petition for Rehearing.

---

[5]In its Petition for Rehearing, Petitioner challenged both the application of the U.C.C. and the award of damages without a showing of causation as unprecedented rules of law outside of the ambit of Rule 35. For purposes of this Petition, Petitioner limits its argument to the holding that an aggrieved party can recover "compensatory" damages which are not caused by the defendant's act.

REASONS FOR GRANTING THE WRIT

I. SUMMARY OF THE REASONS FOR GRANTING THE WRIT

The Court below ruled that no causal nexus need be established between breach and injury to entitle Respondent to an award of damages. The Court avoided accountability for its novel and unfounded decision by ruling by unpublished, uncitable order. But even the court's own rules prohibit the use of an unpublished order when the rule announced is of such clear precedential value.

The use of the no-publication, no-citation rules by the courts of appeals is increasing, thus sheltering more and more of the courts' work from accountability and the principle of stare decisis. Such a practice is departure from acceptable judicial conduct and this Court should exercise

its supervisory powers to condemn this practice.

II. THE DECISION BELOW THAT NO CAUSAL NEXUS NEED BE ESTABLISHED BETWEEN BREACH AND DAMAGES IS UNPRECEDENTED AND WRONG

The Court of Appeals below ruled as follows:

> Fixed expenses, if they satisfy the definition of §2-715(2)(a) are recoverable, notwithstanding general principals of contract law cited by defendant that prohibit recovery of fixed costs. Ill. Rev. Stat. ch. 26 §1-103.

App. at A(4. That ruling is unprecedented and wrong.

The only compensatory damages recoverable in an action for breach of contract are those caused by the breach. This axiomatic principle is central to American jurisprudence and has been reaffirmed by this Court (Illinois Central R.R. Co. v. Crail, 281 U.S. 57, 63 (1930); Miller v. Robertson, 266 U.S. 243, 257 (1924)),

the courts of Illinois (Central Illinois Light Co. v. Stenzel, 44 Ill. App.2d 388, 195 N.E.2d 207 (3d Dist. 1963)) as well as the courts of all other American jurisdictions. See, 5 Corbin on Contracts §992 (West 1964); 11 Williston on Contracts §1338 (1968); Restatement (Second) of Contracts §347).

One measure of such damage, applied in certain circumstances, is the amount of unrecouped expense incurred in reliance upon an agreement. P.S.&.E., Inc. v. Selastomer Detroit, Inc., 470 F.2d 125 (7th Cir. 1972); L. Albert & Son v. Armstrong Rubber Co., 178 F.2d 182 (2d Cir. 1949). Such expenses are recoverable under the presumption that, but for the breach, the non-breaching party would have recouped at least its out of pocket expenses. Fuller and Perdue, The Reliance Interest in

Contract Damages, 46 Yale L.J. 373 (1937).

However, the use of the "reliance expense" measure, as in this case, does not excuse a plaintiff from proving causation; it still must prove that the expenses claimed were caused by its reliance upon the contract. Robie v. Ofgant, 306 F.2d 656 (1st Cir. 1962); Restatement (Second) of Contracts §349. Nor does the Court of Appeal's reliance on the Uniform Commercial Code justify a failure to prove causation. See, e.g., Tarter v. MonArk Boat Co., 430 F.Supp. 1290, 1294-5 (E.D. Mo. 1977), aff'd, 574 F.2d 984 (8th Cir. 1978); Ill. Rev. Stat. ch. 26 §1-103 (1979). Even the Code section cited by the Court refutes its contention that proof of causation is unnecessary. That section allows a recovery of consequential damages "resulting from" the

breach. Ill. Rev. Stat. ch. 26 §2-715(2)(a) (emphasis added).

In effect, the Court of Appeals has held that no causal nexus need be established between the claimed breach of contract and the damage sought--a radical departure from existing law. To avoid accountability for its decision, the Court has determined that this unprecedented rule of law shall apply only to this case and that the decision announcing it shall not be published. Such a result can be explained only as an expedient attempt to avoid the court's duty to decide cases before it on well-reasoned principled grounds. This Court must not allow such conduct.

II. THE SEVENTH CIRCUIT'S OWN RULES REQUIRED THAT THE DECISION IN THE CASE BE PUBLISHED

Seventh Circuit Rule 35, reproduced in the Appendix at A(14-21),

prohibits the Court from ruling by unpublished order when its decision "establishes a new, or changes an existing rule of law" or when it "constitutes a significant and non-duplicative contribution to legal literature . . . by . . . creating a conflict in the law." Under those circumstances, the court must prepare and distribute a fully developed opinion, permit its publication and allow its citation as precedent. Indeed the Resolution of the Judicial Conference of the United States pursuant to which Rule 35 was promulgated, recommends "publication of only those opinions which are of general precedential value." Report of the Judicial Conference of the United States, March 16, 1964. Presumably, where the issue decided by the court is of "general precedential value," publication is not excused.

Since the decision by the court below, dispensing wih proof of causation, changes the rule existing in the federal courts and conflicts with all existing Illinois authority, the use of an unpublished uncitable order is contrary both to Seventh Circuit Rule 35 and to acceptable judicial conduct.

III. THE NO-PUBLICATION, NO-CITATION RULE ALLOWED THE COURT BELOW TO LIMIT THIS NOVEL RULE OF LAW TO THIS CASE, AVOIDING THE ACCOUNTABILITY DEMANDED BY STARE DECISIS AND PUBLICATION; SUCH CONDUCT SO DEPARTS FROM THE ACCEPTED COURSE OF JUDICIAL CONDUCT AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION

Petitioner respects the interest of the courts in limiting the proliferation of published opinions. See, N.L.R.B. v. Amalgamated Clothing Workers, 430 F.2d 966 (5th Cir. 1970); Isbell Enterprises, Inc. v. Citizens Casualty Co., 431 F.2d 409 (5th Cir. 1970); Report of the Judicial Conference of the United States, March 16,

1964. It is particularly understandable that the Court of Appeals would wish to avoid writing a full, publishable opinion in the instant case--a diversity case involving a relatively small sum of money.

Nonetheless Congress has charged the federal courts with the responsibility for such cases. 28 U.S.C. §1332; 28 U.S.C. §1291. Unless the diversity jurisdiction of the federal courts is eliminated or the jurisdictional minimum is increased significantly, cases like the instant case will be decided by federal district courts and appealed to courts of appeals. As long as Congress requires the courts of appeals to hear and decide cases like the case at bar, they must consider the issues presented to them in these cases and rule according to the law and their own rules. Thus, while the courts of appeals are to be afforded great

discretion in establishing rules for the administration of their dockets (Taylor v. McKeithen, 407 U.S. 191, 194, n.4 (1972)), and in interpreting those rules (Doherty v. United States, 404 U.S. 28, 29 (1971)), the courts must not abuse that discretion. Taylor v. McKeithen. Most importantly, they must not fail to meet their statutory obligations, nor may they hide their abuses under the pretext of court administration.

The courts of appeals are, with increasing frequency, deciding cases through the vehicle of unpublished, uncitable orders rather than fully reasoned opinions. Reynolds and Richman, An Evaluation of Limited Publication in the Courts of Appeals: The Price of Reform, 48 U.Chi.L.Rev. 573 (1981). Many unpublished orders contain only the ruling of the court without any exposition; some, like

that issued in the instant case, contain a brief, conclusory statement of the legal rule announced without rationale. Both types of orders facilitate arbitrariness because they fail to discipline the writer by making him or her accountable for the decision reached.

> [A]n articulated discussion of the factors, legal, factual or both, which lead the Court to one rather than to another result, gives strength to the system, and reduces, if not eliminates, the easy temptation or tendency to ill-considered or even arbitrary action by those having the awesome power of almost final review.

N.L.R.B. v. Amalgamated Clothing Workers of America, 430 F.2d 966, 972 (5th Cir. 1970). Similarly, Judge Frank noted, in the context of Federal Rule of Civil Procedure 52:

> [A]s every judge knows, to get down in precise words the facts as he finds them is the best way to avoid carelessness in the discharge of that duty. Often a strong impres-

> sion that . . . the facts are thus-and-so gives way when it comes to expressing that impression on paper.

United States v. Forness, 125 F.2d 928, 942 (2d Cir.), cert. denied sub nom Salamanda v. United States, 316 U.S. 694 (1942).

Commentators, also, have recognized the importance of accountability on the judicial function.

> [T]he necessity for preparing a formal opinion assures some measure of thoughtful review of the facts in a case and of the law's bearing upon them. Snap judgments and lazy preferences for armchair theorizing as against library research and time-consuming cerebral effort are somewhat minimized. The checking of holdings in cases cited, the setting down of reasons in a context of comparison with competing reasons, the answering of arguments seriously urged, the announcement of a conclusion that purportedly follows from the analysis set out in the opinion, are antidotes to casualness and carelessness in decision. They compel thought.

Leflar, Some Observations Concerning Judicial Opinions, 61 Colum.L.Rev. 810 (1961).

> The limited publication rules may interfere with responsible judicial decisionmaking by insulating a substantial portion of the court's product from the demands of stare decisis. Common-law courts have an obligation to avoid inconsistency by deciding like cases in a like manner. This obligation is imposed to limit judicial discretion and ensure full consideration of all relevant arguments.
>
> * * *
>
> A second judicial responsibility that may be undermined by limited publication is the obligation to develop and elaborate the law, both decisional and statutory. There is evidence that the list of unreported decisions at times includes opinions that break new ground. Several factors work to produce this phenomenon. Even the best-intentioned and hardest-working court can make a mistake; it is sometimes difficult to appreciate the full significance of an opinion while writing it. Further, an opinion and the law discussed therein can change form as it is written. There is a danger, however, that such a metamorphosis will go unheeded if it occurs after the decision not to publish has been made.

Reynolds and Richman, The Non Precedential Precedent--Limited Publication and No Citation Rules in the United

States Courts of Appeals, 78 Colum. L.Rev. 1167, 1201,2 (1978). See also, Reynolds and Richman, Limited Publication in the Fourth and Sixth Circuit, 1979 Duke L.J. 807 (1979); Note, Unreported Decisions in the United States Courts of Appeals, 63 Cornell L.Rev. 128 (1977).

There could be no better example of the arbitrariness fostered by the no-publication, no-citation rules than the decision of the court below in the case at bar. The decision was clearly contrary to all existing authority; indeed, the Court of Appeals found no authority to support its novel result.

This is not the first time that the Seventh Circuit has ruled on a controversial or questionable issue of law by way of an unpublished opinion. In Hughes v. Rowe, 449 U.S. 5, (1980), for instance, this Court reversed the decision of the Seventh Circuit which

had "disposed of the novel question presented by petitioner by affirming the fee award in an unpublished order." 101 S.Ct. at 174. And in Browder v. Director, Dept. of Corrections, 434 U.S. 257 (1978) this Court reversed on the merits the decision of the Seventh Circuit, which had ruled by unpublished order (534 F.2d 331 (1976)), leaving the question of the validity of the unpublished order rule "to another day." 434 U.S. at 258, n. 1. See, Will v. United States, 389 U.S. 90 (1967) (vacating an unpublished order of the Seventh Circuit, in part because of the incomplete exposition of its rationale) and Lego v. Twomey, 404 U.S. 477 (1972) (affirming with extended discussion, an unpublished order of the Seventh Circuit). See also, Comment, A Snake In the Path of the Law: The Seventh Circuit's Non-

Publication Rule, 39 U. Pitt. L.Rev. 309 (1977).

Presumably, the Court of Appeals chose not to give full consideration to the instant case because of the small judgment involved; but it is the insignificance of the case to the Court below which makes it so significant to this Court. The decision of the Seventh Circuit is clearly wrong; indeed the notion that no causal nexus between breach and damage need be established is a radical departure from a central tenet of civil jurisprudence. Petitioner does not believe that the Court of Appeals would have affirmed the district court judgment if it had had to do so in a publishable opinion. The conclusion that the judgment could be affirmed only by making new law could properly have been reached only through the

disciplined process of preparing a publishable opinion.

Either the Court of Appeals decided wrongly without understanding the scope of its ruling, or it consciously wished to depart from existing precent. In either event, the use of an unpublished, uncitable order to announce the ruling of the Court of Appeals in this case represents such a radical departure from acceptable judicial conduct that this Court should exercise its supervisory powers.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

Geoffrey G. Gilbert
38th Floor
Three First National Plaza
Chicago, Illinois 60602
(312) 346-6191

On The Brief
Steven B. Varick
38th Floor
Three First National Plaza
Chicago, Illinois 60602
(312) 346-6191

APPENDIX

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
(ARGUED MAY 29, 1981)

June 22, 1981

Before

Hon. WALTER J. CUMMINGS, Chief Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. DANIEL H. THOMAS, Senior District Judge*

HYDROAIRE, INCORPORATED, an Illinois corporation, Plaintiff-Appellee, Cross Appellant,	)	Appeal from the United States District Court for the Northern District of Illinois Eastern Division.
Nos. 80-2846 and 80-2847	)	
v.	)	
CERTAIN-TEED PIPING MATERIALS, INC., Defendant-Appellant, Cross Appellee.	)	No. 77 C 4428 Joel M. Flaum, Judge.

* The Honorable Daniel Holcombe Thomas, Senior Judge of the United States District Court for the Southern District of Alabama, is sitting by designation.

ORDER

Plaintiff, Hydroaire Inc. sued defendant Certain-Teed Piping Materials alleging that Certain-Teed's predecessor in interest, Pollution Equipment Co. ("PEC"), breached an exclusive sales representation agreement between Hydroaire and PEC. The district court, the Honorable Joel M. Flaum, presiding, found that this diversity cause of action was governed by Article 2 of the Uniform Commercial Code, Ill. Rev. Stat. ch. 26, §§2-101 et seq. The district court entered jugment in favor of plaintiff from which plaintiff and defendant cross-appeal. Defendant concedes that it breached the contract but claims that the district court erred in awarding plaintiff $45,422.18 damages because plaintiff failed to rpove any damages resulting from the breach. Plaintiff,

on the other hand, claims that the district court miscalculated the amount of damages. For the reasons discussed in this order, we affirm the judgment of the district court.

Nos. 80-2846 & 80-2847

I.

Certain-teed claims that the district court erred in awarding Plaintiff damages because plaintiff failed to prove that the breach of contract caused any damage. Rather, defendant argues, the only damages plaintiff proved were fixed expenses which are not recoverable under Illinois law. Central Illinois Light Co. v. Stenzel, 44 Ill. App.2d 388, 195, N.E.2d 207 (Ill. App. 1963).

Defendant's argument ignores the effect of article 2 of the Uniform Commercial Code. Section 2-715 permits the aggrieved buyer, in this case Hydroaire, to recover consequential

damages resulting from the breach, including "any loss resulting from general or particular requirements and needs of which the seller at the time of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise." Ill.Rev.Stat. ch. 26, §2-715(2)(a). Fixed expenses, if they satisfy the definition of §2-715(2)(a), are recoverable, notwithstanding general principles of contract law cited by defendant that prohibit recovery of fixed costs. Ill.Rev.Stat. ch. 26 §1-103.

Certain-teed argues alternatively that even if one assumes that Hydroaire could recover fixed expenses attributable to promotion of defendant's product, the district court erred in awarding damages in this case because Hydroaire failed to prove what percen-

tage of the fixed expenses were expended in reliance on the breach contract. Hydroaire, however, was not required to prove with mathematical accuracy which fixed expenses were attributable to promotion of defendant's product. "Compensatory damages are often at best approximate; they have to be proved with whatever definiteness and accuracy the facts permit, but no more." Ill.Rev.Stat. ch. 26, §1-106, comment 1 (emphasis added); Ill.Rev.Stat. ch. 26, §2-715, comment 4; Cates v. Morgan Portable Bldg. Corp., 591 F.2d 17, 20 (7th Cir. 1979). Hydroaire proved its damages by the best evidence available under the circumstances.

We find that the district court did nor err in concluding that a proportion of Hydroaire's fixed expenses were attritubable to promotion of defendant's product, P.S. & E., Inc.

v. Selastomer Detroit, Inc., 470 F.2d 125 (7th Cir. 1972); Fargo Glass & Paint Co. v. Globe American Corp., 161 F.2d 811 (7th Cir. 1947), Ill.Rev.Stat. ch. 26, §1-103, and that these expenses were known to defendant at the time of contracting and could not be prevented by cover. Ill.Rev.Stat. ch. 26, §2-715(2)(a).

II.

Hydroaire claims that the district court erred in failing to include expenses of Hydroflo, plaintiff's subsidiary, in the award of damages. The district court refused to include those expenses because plaintiff failed to demonstrate what proportion of Hydroflo's expenses were incurred in promoting defendant's product. Hydroaire has failed to cite to any evidence in the record demonstrating whether any of Hydroflo's expenses were attributable to reliance on the

breached contract. The district court's finding of fact that Hydroaire failed to prove this portion of its claimed damages is not clearly erroneous. United States v. United States Gypsum Co., 333 U.S. 364 (1948).

III.

Finally, Hydroaire claims that the district court erred in failing to award it damages under a lost income theory. Specifically, plaintiff claims that it should recover damages equal to the amount of profit it would have recovered if it had allocated the time devoted to promoting defendant's product to promoting another product. Hydroaire, however, has failed to cite any authority for this novel damages theory. The Uniform Commercial Code does permit recovery of lost profits resulting from the seller's failure to provide buyer with the contractual goods if seller knew that the buyer

intended to resell the goods. Hoefferle Truck Sales, Inc. v. Divco-Wayne Corp., 523 F.2d 543 (7th Cir. 1975). Hydroaire, however, is not attempting to rely on this accepted lost profits theory. In the absence of any authority for Hydroaire's lost income theory, we find that the district court did not err in rejecting plaintiff's argument.

IV.

The judgment from which plaintiff and defendant cross-appeal is affirmed. Eacy party is to bear its own costs of appeal.

AFFIRMED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 11, 1981

Before
Hon. WALTER J. CUMMINGS, Chief Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. DANIEL H. THOMAS, Senior District Judge*

HYDROAIRE, INCORPORATED, an Illinois corporation, Plaintiff-Appellee, Cross Appellant,	)	Appeal from the United States District Court for the Northern District of Illinois Eastern Division.
Nos. 80-2846 and 80-2847	)	
v.	)	
CERTAIN-TEED PIPING MATERIALS, INC., Defendant-Appellant, Cross Appellee.	)	No. 77 C 4428 Joel M. Flaum, Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above entitled cause by the Defendant- Appellant Certain-teed Piping Materials, Inc., no judge in active service has

requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

---

* The Hon. Daniel H. Thomas, Senior Judge of the United States District Court for the Southern District of Alabama, is sitting by designation.

III. Memorandum Opinion Of The District Court for the Northern District of Illinois, Conclusion of Law, Paragraph 12.

12. Where a party to a contract is prevented by performing by the other party, the primary measure of damages is the amount of his loss, which may consist of either his reasonable outlay or expenditure toward performance. Izzo v. City of Loves Park, 20 Ill. App. 2d 117, 155 N.E.2d 312, 317 (2d Dist. 1959). Thus, where an exclusive sales representation agreement is breached, an appropriate measure of damages is the amount expended by the wronged party in reliance on the agreement. Burton v. Hitachi America,

Ltd., 504 F.2d 721, 726 (7th Cir. 1974); P.S. & E. Inc. v. Selastomer Detroit, Inc., 470 F.2d 125, 128-129 (7th Cir. 1972). Applying the percentage of time plaintiff's salesmen spent promoting the EMU pump to the expenses incurred by plaintiff's product division from December 1, 1974 to August 31, 1976, the expenses allocable to the promotion of the EMU pump are $2,313.64 in December of 1974, $32,975.65 in 1975, and $19,158.10 in the eight months ended August 31, 1976, totalling $54,447.39. After subtracting the gross profits of $9,025.00 which plaintiff obtained from selling EMU pumps, plaintiff

expended $45,422.39 in reliance on the Agreement.

CIRCUIT COURT RULE 35. The following rule is the Plan for Publication of Opinions of the Seventh Circuit promulgated pursuant to resolution of the Judicial Conference of the United States:

(a) Policy. It is the policy of the circuit to reduce the proliferation of published opinions.

(b) Publication. The court may dispose of an appeal by an order or by an opinion, which may be signed or per curiam. Orders shall not be published and opinions shall be published.

(1) "Published" or "publication" means:

(i) Printing the opinion as a slip opinion;

(ii) Distributing the printed slip opinion to all federal judges within the circuit, legal publishing companies, libraries and other regular subscribers, interested United States attorneys, departments and agencies, and the news media;

(iii) Permitting publication by legal publishing companies as they see fit; and

(iv) Unlimited citation as precedent.

(2) Unpublished Orders;

(i) shall be typewritten and reproduced by copying machine;

(ii) shall be distributed only to the circuit judges, counsel for the parties in the case, the lower court judge or agency in this case, and the news media, and shall be available to the public on the same basis as any other pleading in the case;

(iii) shall be available for listing periodically in the Federal Reporter showing only title, docket number, date, district or agency appealed from with citation or operative words of the order, such as "affirmed", "enforced", "reversed", "reversed and

remanded", and so forth;

(iv) except to support a claim of res judicata, collateral estoppel or law of the case, shall not be cited or used as precedent (a) in any federal court within the circuit in any written document, or in oral argument or (b) by any such court for any purpose.

(c) GUIDELINES FOR METHOD OF DEPOSITION.

(1) Published Opinions. A published opinion will be filed where the decision

(i) establishes a new, or changes an existing rule of law;

opinion available for publication, it is expected that a single judge will ordinarily respect and abide by the opinion of the majority in determining whether to publish.

(3) Any person may request by motion that a decision by unpublished order be issued as a published opinion. The request should state the reasons why the publication would be consistent with the guidelines for method of disposition set forth in this rule.

agency has published an opinion supporting the judgment or order; or

(vi) is pursuant to an order of remand from the Supreme Court and is not rendered merely in ministerial obedience to specific directions of the court.

(2) Unpublished Orders. When the decision does not satisfy the criteria for publication, as stated above, it will be filed as an unpublished order. The order will ordinarily contain reasons for the judgment, but may not do so if the court has

(ii) involves an issue of continuing public interest;

(iii) criticizes or questions existing law;

(iv) constitutes a significant and non-duplicative contribution to legal literature

(A) by a historical review of law;

(B) by describing legislative history; or

(C) by resolving or creating a conflict in the law;

(v) reverses a judgment or denies enforcement of an order when the lower court or

announced its decision and reasons from the bench. A statement of facts may be omitted from the order or may not be complete or detailed.

(d) DETERMINATION OF WHETHER DISPOSITION IS TO BE BY ORDER OR OPINION.

(1) The determination to dispose of an appeal by unpublished order shall be made by a majority of the panel rendering the decision.

(2) The requirement of a majority represents the policy of the circuit. Notwithstanding the right of a single federal judge to make an

Illinois Revised Statutes Ch. 26

§1-103. SUPPLEMENTARY GENERAL PRINCIPLES OF LAW APPLICABLE

Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other invalidating cause shall supplement its provisions.

Illinois Revised Statutes Ch. 26

§2-715. BUYER'S INCIDENTAL AND CONSEQUENTIAL DAMAGES

(1) Incidental damages . . . resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

(2) Consequential damages resulting from the seller's breach include

(a) any loss resulting from general or particular requirements and needs of which the

seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(b) injury to person or property proximately resulting from any breach of warranty.